



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF T-J-B-, INC.

DATE: SEPT. 12, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a supplier of coffee to businesses and other organizations, seeks to employ the Beneficiary as a senior sales engineer. It requests his classification under the second-preference, immigrant category as a member of the professions holding an advanced degree. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, “EB-2” category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a position requiring at least a master’s degree, or a bachelor’s degree followed by five years of experience.

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its required ability to pay the proffered wage.

On appeal, the Petitioner argues that the Director disregarded the willingness of its president to forego compensation to pay the proffered wage and evidence of the company’s financial health.

Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, an employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If the DOL approves a position, a prospective employer must next submit the labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the requirements of a certified position and can pay a certified proffered wage. If USCIS approves a petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence.¹ 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

To determine ability to pay, USCIS first examines whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not annually pay the full proffered wage, USCIS considers whether it generated annual amounts of net income or net current assets sufficient to fund any differences between the proffered wage and the wages paid. If net income and net current assets are insufficient, USCIS may consider other factors affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).²

Here, the labor certification states the proffered wage of the offered position of senior sales engineer as \$139,776 a year. The Petitioner did not submit evidence that it paid wages to the Beneficiary. Based on payments to the Beneficiary, the record therefore does not establish the Petitioner's ability to pay the proffered wage.

Copies of the Petitioner's federal income tax returns for 2017 reflect net income of \$17,358 and net current assets of \$6,349.³ Because these amounts neither equal nor exceed the annual proffered wage of \$139,776, they do not establish the Petitioner's ability to pay the proffered wage. Thus, based on examinations of wages paid, net income, and net current assets, the Petitioner has not demonstrated its ability to pay the proffered wage.

On appeal, the Petitioner notes that, in response to the Director's request for evidence, it submitted a written pledge from its president/co-shareholder. The president promised to forego compensation from the company if needed to pay the Beneficiary's proffered wage. The Petitioner also submitted evidence that, in addition to his share of the company's net income, the president received annual compensation amounts of \$48,000 in 2016 and 2017.

¹ This petition's priority date is May 1, 2017, the date the DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

² Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g.*, *River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009).

³ The Director found that the Petitioner generated 2017 net income of \$133,753, the amount listed as "Ordinary business income" on line 21 of the Petitioner's IRS Form 1120S, U.S. Income Tax for an S Corporation. Having chosen to be treated as an S corporation for federal tax purposes, however, the Petitioner reported additional deductions and reconciled its net income on Schedule K to Form 1120S. *See* Internal Revenue Serv. (IRS), Instructions to Form 1120S, 18, <https://www.irs.gov/pub/irs-pdf/f1120s.pdf> (describing Schedule K as "a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.") (last visited Aug. 2, 2018). We therefore consider the reconciled amount of \$17,358 on line 18 of Schedule K to reflect the Petitioner's net income for 2017.

The president's pledge, however, does not establish the Petitioner's ability to pay the proffered wage. The president's foregone compensation of \$48,000 in 2017 would not have covered the \$122,418 difference between the annual proffered wage and the company's net income. The record also does not demonstrate the discretionary nature of the annual, \$48,000 payments to the president, such that it could have been diverted to pay the proffered wage. Rather, the consistency of the payment amounts suggests that the Petitioner has a contractual obligation to pay its president \$48,000 a year.

The Petitioner also submitted copies of its monthly bank account statements from December 2016 through January 2018. The Petitioner, however, has not demonstrated that the net current assets reflected on its 2017 tax returns, which we have already considered, did not include these funds. The record therefore does not demonstrate the Petitioner's ability to pay the proffered wage with the bank funds in 2017.

Finally, the Petitioner notes that the Director disregarded evidence of its overall financial status. As previously indicated, USCIS may consider a petitioner's ability to pay a proffered wage beyond its wages paid, net income, and net current assets. Under *Sonegawa*, USCIS may consider such factors as: the number of years the Petitioner has conducted business; its number of employees; the growth of its business; its incurrence of uncharacteristic losses or expenses; its reputation in its industry; the Beneficiary's replacement of a current employee or outsourced service; or other factors affecting its ability to pay the proffered wage. *Matter of Sonegawa*, 12 I&N Dec. at 614-15.

Here, the record indicates the Petitioner's commencement of business in 2003. Copies of its federal income tax returns also reflect increasing annual revenues from 2015 through 2017. On the Form I-140, the Petitioner claimed to employ nine people. Its tax returns, however, do not indicate that it paid any salaries or wages from 2015 through 2017. The returns reflect contract labor expenses. But these expenses do not exceed \$121,688 in any year, an amount less than the annual proffered wage. In fact, this amounts to less than \$14,000 per employee in those years. The low amount of wages paid raises doubt as to the Petitioner's claim that it could have paid an additional \$139,776 per year to the Beneficiary. Also, unlike the petitioner in *Sonegawa*, the Petitioner here has not demonstrated its incurrence of uncharacteristic expenses or its possession of an outstanding reputation in its industry. In addition, the record does not demonstrate the Beneficiary's replacement of a current employee or outsourced service. Thus, a totality of the circumstances under *Sonegawa* does not establish the Petitioner's ability to pay the proffered wage.

The record on appeal does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm the Director's decision.

III. THE REQUIRED EXPERIENCE

Although unaddressed by the Director, the record also does not establish the Beneficiary's qualifying experience for the offered position. A petitioner must demonstrate a beneficiary's possession of all DOL-certified job requirements by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N

Dec. 158, 160 (Acting Reg'l Comm'r 1977). In evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that the "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

Here, the labor certification states the minimum requirements of the offered position of senior sales engineer as a U.S. bachelor's degree in computer or sales engineering, and five years of experience "in the job offered." The labor certification specifies that the Petitioner will not accept experience in an alternate occupation.

On the labor certification, the Beneficiary attested that, by the petition's priority date he gained more than 30 years of employment experience. The record, however, does not establish that his experience included at least five years in the job offered.

Experience in the job offered means experience performing the job duties of the offered position listed on the labor certification. *Matter of Symbioun Techs., Inc.*, 2010-PER-01422, 2011 WL 5126284 *2 (BALCA Oct. 24, 2011) (citations omitted). The labor certification here lists the following job duties:

Provide product, service, and equipment technical and engineering information by answering questions and requests. Establish new accounts and services accounts by identifying potential customers; planning and organizing sales call schedule. Prepare cost estimates by studying blueprints, plans, and related customer documents; consulting with engineers, architects, and other professional and technical personnel. Determine improvements by analyzing cost-benefit ratios of equipment, supplies, or service applications in customer environment; engineering or proposing changes in equipment, processes, or use of materials or services. Submit orders by conferring with technical support staff; costing engineering changes. Comply with federal, state, and local legal requirements by studying existing and new legislation; anticipating future legislation; advising customer on product, service, or equipment adherence to requirements; advising customer on needed actions. Prepare sales engineering reports by collecting, analyzing, and summarizing sales information and engineering and application trends. Maintain professional and technical knowledge by attending educational workshops; reviewing professional publications; establishing personal networks; participating in professional societies. Contribute to sales engineering effectiveness by identifying short-term and long-range issues that must be addressed; providing information and commentary pertinent to deliberations; recommending options and courses of action; implementing directives. Contribute to team effort by accomplishing related results as needed.

Pursuant to 8 C.F.R. § 204.5(l)(3)(ii)(A), the Petitioner submitted letters from two of the Beneficiary's former employers. Covering more than 25 years of the Beneficiary's experience, the letters state the Beneficiary's experience in designing and developing information technology systems and managing software implementation projects. But the letters do not establish his experience performing many of the listed job duties of the offered position of senior sales engineer. The letters do not demonstrate that the Beneficiary: established new accounts by identifying potential customers; prepared cost estimates by studying blueprints and plans; complied with federal, state, and local regulations; and prepared sales engineering reports.

For the foregoing reasons, the record does not establish the Beneficiary's possession of the requisite five years of experience in the job offered. In any future filings in this matter, the Petitioner must submit additional evidence to establish the Beneficiary's qualifying experience in the job offered.

IV. CONCLUSION

The record on appeal does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm the Director's decision.

ORDER: The appeal is dismissed.

Cite as *Matter of T-J-B-, Inc.*, ID# 1659595 (AAO Sept. 12, 2018)